

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Rick Lutzi,

Complainant,

v.

PROBABLE CAUSE ORDER

Jay Phillips,

Respondent.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge James E. LaFave on March 6, 2014. This matter was convened to consider a campaign complaint filed under the Fair Campaign Practices Act by Rick Lutzi on February 27, 2014. The probable cause hearing was conducted by telephone conference call. The probable cause record closed on March 6, 2014.

Rick Lutzi (Complainant) appeared on his own behalf and without counsel. Robert G. Suk, Robert G. Suk Law Offices, appeared on behalf of Jay Phillips (Respondent).

Based upon the record and all the proceedings in this matter, and for the reasons set forth in the attached Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. There is probable cause to believe that Respondent Jay Phillips violated Minnesota Statutes § 211B.04 by failing to include a disclaimer on a campaign flyer mailed to constituents and on advertisements published in the *Byron Review* on February 25, 2014 and March 4, 2014, promoting his candidacy for Salem Township Supervisor.

2. There is no probable cause to believe that Respondent Jay Phillips violated Minn. Stat. § 211B.04 in connection with campaign signs that Bryce DeCook and Ronald Tiede prepared and disseminated in support of Mr. Phillips' candidacy for Salem Township Supervisor. The claim is **DISMISSED**.

3. This matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges, pursuant to Minn. Stat. § 211B.35.

4. Should the Parties decide that this matter may be submitted to the assigned Panel of Judges based on this Order and the record created at the Probable Cause hearing, without an evidentiary hearing, they should notify the undersigned Administrative Law Judge by **4:30 p.m. on Monday, March 17, 2014**. If both Parties do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing in the near future.

Dated: March 11, 2014

s/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

Factual Background

Complainant Rick Lutzi is the current Chair of the Salem Township Board of Supervisors and is running for re-election on March 11, 2014. Respondent Jay Phillips is also a candidate for Salem Township Supervisor in the March 11, 2014 election.

On February 27, 2014, Mr. Lutzi filed this Complaint alleging that Mr. Phillips, prepared and disseminated a campaign flyer and campaign signs promoting his candidacy for Salem Township Supervisor that lacked the disclaimer required by Minn. Stat. § 211B.04.¹ Prior to the probable cause hearing, the Complainant submitted copies of advertisements promoting Mr. Phillip's candidacy that also lacked disclaimers required by Minn. Stat. § 211B.04.² The advertisements were published in the *Byron Review* on February 25 and March 4, 2014.

In response to the Complaint, Mr. Philips argues that the campaign flyer falls within the exception contained in the statute that excludes "personal letters that are clearly being sent by the candidate"³ and therefore was not required to include a disclaimer. With respect to the newspaper advertisements, Mr. Phillips asserts that it is the newspaper's responsibility to include a disclaimer with the advertisements and that *Byron Review* failed to do so. Finally, Mr. Phillips states that he did not participate in the preparation and dissemination of the campaign signs. Instead, the signs were

¹ Complaint.

² Exs. 1-4.

³ Testimony (Test.) of Jay Phillips. See, Minn. Stat. § 211B.04(e).

prepared and disseminated by Bryce DeCook and Roanld Tiede, and they fall within the exemption for material prepared by individuals who act independently of the candidate.⁴

Legal Standard

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.⁵ If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.⁶ A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondent has committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

Analysis

Minnesota Statutes § 211B.04 requires a person “who participates in the preparation or dissemination” of “campaign material” to “prominently” include the name and address of the person or committee causing the material to be prepared or disseminated.⁷ The disclaimer is required to provide the name and address of the candidate's committee that prepared and paid for the signs and must read substantially as follows: “Prepared and paid for by the _____ committee _____ (address).”⁸ Campaign material is defined in relevant part as any material disseminated for the purpose of influencing voting.⁹

⁴ Test. of J. Phillips; See, Minn. Stat. § 211B.04(f).

⁵ *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

⁶ *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the standard for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

⁷ Minn. Stat. § 211B.01, Subd. 2 defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”

⁸ Minn. Stat. § 211B.04.

⁹ Minn. Stat. § 211B.01, subd. 2.

The flyer,¹⁰ newspaper advertisements,¹¹ and campaign signs¹² promoting the Respondent's candidacy all meet the definition of "campaign material" and all lacked a disclaimer substantially in the form required by Minn. Stat. § 211B.04.

Each allegation will be discussed below.

a. The flyer

The Respondent testified that he prepared and mailed the flyer to 325 households in Salem Township. He maintains, however, that the flyer is a "letter" and that it falls within the exception under § 211B.04(e) for "personal letters that are clearly being sent by the candidate." The Respondent admitted that the flyer does not have his address and the envelope also had no return address on it.¹³

A copy of the campaign material appears below:

¹⁰ Complaint Ex. A.

¹¹ Exs. 2-5.

¹² Complaint Ex. B-D.

¹³ Test. J. Phillips.



Vote: March 11, 2014

**At Salem Town Hall
Salem Corners
County Rd 3 and Salem Rd SW**



Jay Phillips

For

Salem Township Supervisor

"I will work with the Board to serve the needs of the residents while bringing new ideas and a fresh perspective to Salem Township"

Personal Information:

- Resident of Salem Township since 2001
- Married
- Father of two
- Three grandchildren attending school in Byron
- Enjoys camping, fishing, cooking, and auto racing
- U.S. Army Reserve 1970 – 1976
MOS – Combat Medic

Professional Information:

- Procurement-Buyer, Supply Chain Specialist at IBM until retirement in 2009
- Trained in supplier negotiation
- Co-Founder of LAPS Auto Repair, October/1999
- Currently working part time in Quality Control for Maysteel Corp at IBM Rochester

*****Vote on Tuesday, March 11, 2014
7:00 AM until 8:00 PM**

****Approved by Jay Phillips**

Ex A

The Administrative Law Judge finds that the above campaign material, identified as Complaint Ex. A, is a flyer and not a "personal letter." The phrase "personal letter" suggests individualized correspondence to a specific individual. The flyer in question contains no personal greeting or salutation, no signature, and was mailed to all citizens of Salem Township. It encourages recipients to vote for the Respondent on March 11, 2014, and includes the caveat: "Approved by Jay Phillips." The document is clearly a campaign flyer and not a "personal letter." It therefore does not fall within the exception to the disclaimer requirement provided at Minn. Stat. § 211B.04(e).

The Administrative Law Judge finds that the Complainant has put forward sufficient facts to support finding probable cause that Respondent Jay Phillips violated Minn. Stat. § 211B.04 by failing to prominently include a disclaimer on the flyer substantially in the form required under Minn. Stat. § 211B.04(b).

b. The campaign signs

Campaign signs were placed throughout Salem Township promoting Mr. Phillips' candidacy for supervisor. The signs read:

For A Better Township
Vote Phillips (diagonal on the sign)
Jay for Supervisor Linda for Clerk
March 11, 2014 7:00 AM-8:00 PM¹⁴

The signs do not include a disclaimer or indicate who prepared or paid for the sign.

At the probable cause hearing Mr. Bryce DeCook testified that he, alone, was responsible for those signs.¹⁵ Mr. DeCook, stated that he designed that signs with help from staff at Office Max, and paid for the signs with his own money.¹⁶ Mr. DeCook testified that he spent approximately \$400.¹⁷ Mr. DeCook also testified he placed 18, two-sided signs, throughout Salem Township.¹⁸ The signs were placed with the consent of the landowners.¹⁹ Both Mr. DeCook and the Respondent testified that the Respondent did not participate in the preparation or placement of the signs, and in fact, was not even aware that the signs were being made and distributed.²⁰

Mr. Ronald Tiede testified that, on his own initiative, he prepared and placed the signs depicted in Ex. 6.²¹ Mr. Tiede stated that he placed six signs in support of Mr. Phillips throughout the township.²² Mr. Tiede testified that he did not ask Respondent's permission or even consult with the Respondent before placing the signs.²³ Both Mr. Tiede and the Respondent testified that the preparation and placement of the campaign signs was done without Respondent's knowledge.²⁴ Mr. Tiede stated that he spent about \$125 for 14 signs and posted about 12 signs.²⁵

Based on the testimony of Mr. DeCook and Mr. Tiede, the Respondent argues the Complainant has failed to allege a violation of Minn. Stat. § 211B.04 with respect to the campaign signs. The Respondent asserts that he did not participate in the

¹⁴ Complaint Ex. A.

¹⁵ Test. of Bryce DeCook.

¹⁶ Test. of B. DeCook.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Test. of B. DeCook and Respondent.

²¹ Test. of Ronald Tiede; See, Ex. 6.

²² Test. of R. Tiede.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

preparation or distribution of the signs and instead, Mr. DeCook and Mr. Tiede acted independently of his campaign in creating and posting the signs.²⁶ The Respondent also notes that Minn. Stat. § 211B.04(f) provides an exception to the disclaimer requirement for individuals who act independently of a candidate and who spend less than \$2,000 of their own money to produce or distribute campaign material.

The Complainant conceded at the probable cause hearing that he had no idea who prepared or distributed the lawn signs.

The Administrative Law Judge finds that the Complainant has failed to allege sufficient facts to support finding probable cause that Respondent Phillips violated Minn. Stat. § 211B.04 with respect to the campaign lawn signs. There is no evidence that Respondent prepared or disseminated the lawn signs at issue. This allegation is dismissed.

c. The newspaper advertisements in the *Byron Review*

The Respondent placed campaign advertisements in the local newspaper, *Byron Review*, that were published in the paper's February 25, and March 4, 2014 editions.²⁷ The advertisement that was published on February 25, 2014 read:

Elect
Jay Phillips, Salem Twp Supervisor
"The right experience, the right choice"
Linda Phillips, Salem Twp Clerk
"Because principal matters ..."
Vote: March 11, 2014²⁸

The advertisement did not include a disclaimer indicating who prepared or paid for the advertisement.

The Respondent testified that he provided the wording for the advertisement to the newspaper and assumed that the newspaper would include the disclaimer. The Respondent thus maintains that the lack of a disclaimer in the advertisements is the fault of the newspaper.

The March 4, 2014 advertisement in the *Byron Review*, was identical to the advertisement published in the February 25th edition, except that at the very bottom of the advertisement in smaller font is the phrase "Paid Advertisement."²⁹ Respondent testified that the newspaper is supposed to have "paid advertisement" included in the advertisement.³⁰

²⁶ Test. of L. Phillips.

²⁷ Test. J. Phillips; See, Exs. 1-4.

²⁸ Exs. 1 and 2.(Emphasis in the original).

²⁹ Exs. 3 and 4.

³⁰ Test. of J. Phillips.

It appears that the Respondent is confusing the newspaper's obligation under Minn. Stat. § 211B.05, subd. 1, to include the phrase "PAID ADVERTISEMENT" at the beginning or end of any advertisement accepted for publication, with his obligation under § 211B.04 to include a disclaimer identifying who prepared and paid for the campaign material.

The Complainant has put forth sufficient facts to support finding probable cause that the Respondent violated Minn. Stat. § 211B.04 with respect to the newspaper advertisements published in the *Byron Review*.

Conclusion

The Administrative Law Judge concludes that based on the record presented, the Complainant has demonstrated probable cause to believe that Respondent violated Minn. Stat. § 211B.04 with respect to the campaign flyer and the newspaper advertisements printed in the *Byron Review*. It is reasonable to require the Respondent to go to hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondent violated Minn. Stat. § 211B.04, and if so, what penalty is appropriate. The allegation concerning the lawn signs is dismissed.

Should the Parties decide to waive the evidentiary hearing and submit the matter on the record made at the Probable Cause hearing with further written submissions, they must notify the ALJ by the date and time stated in the Order.

J. E. L.